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Supreme Court, U.S.
FILED
MAY 4 1994
OFFICE OF THE CLERK

No. 93-1533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

ROBERTSON OIL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

This memorandum responds to the brief in opposition to certiorari of respondent Robertson Oil Company.

1. Question 1—Applicability of the Law of the Case Doctrine During *En Banc* Review.

Robertson has chosen to mischaracterize and dodge the essence of Question 1. It argues that the Eighth Circuit simply chose not to revisit errors committed by prior interlocutory[1] panel decisions because Phillips failed to meet the requirements of the law of the case doctrine by showing that the incorrect rulings constituted "clear error or manifest injustice." *See* Opp. at 7, 11, 13. But the question presented here is whether the law of the case doctrine applies *at all* when a court of appeals grants *en banc* review. The Eighth Circuit explicitly answered this question in the affirmative. *See* Pet. App. 4a & n.5; *id.* 19a & n.13. As three dissenting judges expressly recognized, *id.* 29a, this holding directly conflicts with the *en banc* decisions of the Second, Sixth and Ninth Circuits, which have held that the law of the case doctrine is wholly inapplicable in the context of *en banc* review. *Van Gemert* v. *Boeing Co.*, 590 F.2d 433, 437 n.9 (2d Cir. 1978), *aff'd.*, 444 U.S. 472 (1980); *Watkins* v. *United States Army*, 875

[1] Robertson charges Phillips with "semantic creativity" for referring to the first two panel decisions as "interlocutory." Opp. at 15. However, both of the challenged decisions remanded the case for further proceedings in the district court, neither decision was final, and both were by definition, interlocutory. *See, e.g., Virginia Military Institute* v. *United States*, 113 S. Ct. 2431 (1993) (opinion of Scalia, J., respecting denial of certiorari) (where Fourth Circuit had remanded case for "determination of an appropriate remedy" judgment was not final); *see generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18 at 195-98 (7th ed. 1993).

F.2d 699, 704 n.8 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990); *Shimman* v. *International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985). None of these other decisions applied the clear error or manifest injustice standards of the law of the case doctrine, and all three overturned prior interlocutory panel decisions in circumstances indistinguishable from those presented here. *See* Pet. at 11-12.

Robertson argues that "[t]he cases cited by Phillips from other circuits do not raise a conflict" because the "Second, Sixth, and Ninth Circuits apply essentially the same [law of the case] rule as every other circuit." Opp. at 12, 13. But Robertson supports this incorrect statement by citing two *panel* decisions that did nothing more than apply ordinary law of the case principles with respect to other panel rulings.[2] Robertson also relies, inexplicably, on the Second Circuit's decision in *Van Gemert*, which unequivocally rejects the argument that "the court sitting *en banc* . . . [should] consider itself bound by the law of the case established by a panel in an earlier appeal." 590 F.2d at 437 n.9.[3]

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[2] *Kimball* v. *Callahan*, 590 F.2d 768, 771 (9th Cir.) ("one *panel* of an appellate court will not as a general rule reconsider questions which *another panel* has decided on a prior appeal in the same case") (emphasis added), *cert. denied*, 444 U.S. 826 (1979); *In re United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973). Throughout its opposition, Robertson cites panel decisions that have nothing to do with the question whether *en banc* review is constrained by the law of the case doctrine. *See, e.g., City Public Service Bd.* v. *General Electric Co.*, 935 F.2d 78, 82 (5th Cir. 1991).

[3] Robertson's assertion that *Van Gemert* actually "applies" (Opp. at 12, 13) the law of the case doctrine is, in a word, false. *Van Gemert* is the seminal decision holding that the law of the case doctrine does not apply during *en banc* review, and was cited for that very proposition by the Sixth Circuit in *Shimman*, 744 F.2d at 1229 n.3, the Ninth Circuit in *Watkins*, 875 F.2d at 704 n.8, and the dissent below. Pet. App. 29a.

Robertson is equally wrong in relying on *Moore's Federal Practice* to support its argument that the decision below is "consistent with the rule in all circuits and this Court." Opp. at 12. That treatise asserts the opposite: "The decision of a panel is *not* the law of the case in an appeal decided by the court in banc. This being so, even if the panel on a second appeal may not correct an earlier error by another panel, it can be corrected by rehearing in banc." *See* 1B J. Moore, *Moore's Federal Practice* ¶ 0.404 [4.-5] at II-25 n.12 (2d ed. 1993) (emphasis added).

Robertson also apparently assumes that *this* Court is bound by the law of the case as established by the first two panel decisions and that Phillips is asking this Court to address the merits of the partial remand question during plenary review. *See, e.g.*, Opp. at 15 ("Both decisions were appealable . . . . Prior to this writ, Phillips has never asked this Court to vacate *Robertson* I."). This Court, of course, is not bound by the law of the case. *See, e.g.*, R. Stern, *et al.*, *Supreme Court Practice*, § 2.2, at 40-41. Moreover, the point of Phillips' petition for certiorari is that the *en banc* Eighth Circuit had the responsibility to address and resolve the partial remand question in the first instance and should not have been prevented from doing so by virtue of the law of the case doctrine.[4] The Eighth Circuit's

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[4] As suggested by Justice Ginsburg's questions to petitioner's counsel during oral argument in *Honda Motor Corp.* v. *Oberg*, No. 93-644, *cert. granted*, 114 S. Ct. 751 (argued Apr. 20, 1994), the issue whether "it's compatible with due process to have a new trial limited to punitive damages only, or whether you'd have to have the entire trial," Tr. at 7, is important and unresolved. Indeed, the first panel's decision to order a new trial limited solely to the issue of punitive damages conflicts with the decisions of several other circuits and is inconsistent with this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931). *See* Pet. at 14-15 & n.6.

The first panel's decision also conflicted with several other Eighth Circuit panel decisions, *see* Pet. at 14-15, and was integrally related to the other issues presented for *en banc* review. *See* Pet. App. 27a (Beam,

error raises an exceptionally important question because it imposes stringent and unwarranted limitations on the scope of *en banc* review that defeat the entire purpose of the *en banc* process and Fed. R. App. P. 35(a). The ruling effectively shields an entire class of cases from *en banc* review, and therefore can only increase the number of cases in which this Court's review will be required. *See* Pet. at 13.

To be sure, the courts of appeals have discretion to decide whether to grant *en banc* review in the first place, but this Court has made clear that "[i]f . . . [*en banc* review] is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals," and "the responsibility lies with this Court to define these requirements and insure their observance." *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, 260 (1953). Thus, Phillips is not asking this Court to "micromanage," Opp. at 14, the courts of appeals, but rather to clarify a fundamental question concerning the proper procedure by which the federal courts shall resolve important questions of federal law.[5]

J., dissenting). The court below did not disavow the importance of the partial remand question, or the intra- and inter-circuit conflicts that it has produced.

[5] Robertson's contention that Phillips "failed to preserve" the law of the case issue because it has "never asked this Court to vacate *Robertson* I," Opp. at 15, is without merit. Phillips was under no obligation to file a certiorari petition from the first panel's decision, since the Eighth Circuit had remanded the case for further proceedings and the decision therefore was not final. *See Virginia Military Institute*, 113 S. Ct. at 2431, 2432 (opinion of Scalia, J., respecting the denial of certiorari); *see* R. Stern, *et al.*, *Supreme Court Practice*, § 2.2 at 40. Indeed, this Court's practice strongly discourages litigants from filing certiorari petitions under such circumstances. *Virginia Military Institute*, 113 S. Ct. at 2432 (Scalia, J.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Robertson's contention that "except before this Court," Phillips has never argued "that *Robertson* I should be revisited," Opp. at 9, 15, is

2. Question 2—The Constitutionality of the Arkansas "Shock the Conscience" Test.

Robertson does not dispute that the decision below sustaining the constitutionality of the Arkansas "shock the conscience" punitive damage review standard conflicts with the Fourth Circuit's decisions in *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) and *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992) (*en banc*), and the Ninth Circuit's decision in *Morgan* v. *Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994). All three cases condemn as inconsistent with the due process principles articulated in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), the *ad hoc*, subjective and highly deferential judicial review process endorsed by the Eighth Circuit here.

Robertson instead defends the Arkansas shock the conscience standard on the merits, contending that a post-verdict review procedure has "evolved" (Opp. at 16) in Arkansas that imposes standards that "are limiting." *Id.* at 17. But that argument is a mirage because the Arkansas courts have never adopted or regularly applied such standards, and repeatedly declare that punitive damage verdicts must stand because they do not shock the conscience.[6]

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equally erroneous. Phillips challenged the first panel's partial remand at every stage of the proceedings below. *See* Supplemental Appendix, *infra*, 1a-2a (rehearing petition in first appeal); *id.* 3a-4a (petition for rehearing and suggestion for rehearing *en banc* in second appeal); *id.* 5a-6a (suggestion for rehearing *en banc* in third appeal); *id.* 7a-10a (supplemental briefs during rehearing *en banc*).

[6] *See, e.g., Maxwell* v. *Walser*, 751 S.W.2d 351, 353 (Ark. 1988) ("we cannot say that the . . . punitive damages . . . shocked the conscience of this court"); *Lindsey* v. *Watts*, 621 S.W.2d 679, 681 (Ark. 1981) ("A jury's award will not be set aside unless it is so disproportionate to the evidence that it shocks the conscience of the court."); *Parker* v. *Brush*, 637 S.W.2d 539, 540 (Ark. 1982) ("The awards, even if they cannot be described as modest[,] . . . certainly do not shock the con-

Moreover, while the district court here presented a laundry list of "factors" that had been mentioned by Arkansas courts, *see* Pet. App. 119a, there is no rhyme or reason in Arkansas law for applying any or all of those factors. In Arkansas, the reviewing courts simply mention whatever factors come into the vocabulary of the particular reviewing court. There is no "standard." A shock the conscience review is the antithesis of a meaningful standard; it is purely intuitive.

Most importantly, even if the courts below *had* applied standards *and* had found the awards to be excessive, Arkansas would not permit interfering with the jury's verdict unless the court was subjectively "shocked" by the size of the award. *See, e.g., O'Neal Ford, Inc.* v. *Davie*, 770 S.W.2d 656, 659 (Ark. 1989) (reversing trial court's remittitur of punitive damage award because trial judge was only "mildly surprised" by its size, rather than "shocked," and declaring that " '[a] belief by a trial court that damages are excessive is not, standing alone, a sufficient ground for ordering a reduction' "). This non-existent review of standardless jury discretion to impose unlimited punishment[7] cannot be squared with *Haslip*. *See* 499 U.S. at 20-22.

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science.").

Federal courts applying Arkansas law apply the same visceral approach. *See, e.g., Peoples Bank & Trust Co.* v. *Globe International Publishing, Inc.*, 978 F.2d 1065 (8th Cir. 1992) (refusing to overturn $800,000 punitive damage award as excessive, even though it found $650,000 compensatory award, on which the punitive award was based, "shockingly inflated"), *cert. denied*, 114 S. Ct. 343 (1993); *McGee* v. *Hester*, 815 F.2d 1193, 1197 (8th Cir.) ("Although the amount may seem large, we do not believe that it shocks the conscience."), *cert. denied*, 484 U.S. 963 (1987).

[7] "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Landgraf* v. *USI Film Products*, No. 92-757, slip op. at 37 (U.S. Apr. 26, 1994). However, "[u]nlike

The punitive damage jury instructions in this case were not "further constraints" that mitigated the need for rigorous judicial analysis. Opp. at 18. The *only* information concerning calculation of the amount of the award provided by the Arkansas model jury instruction given here was that punitive damages are imposed to punish and deter and that "[i]n arriving at the amount of punitive damages you may consider the financial condition of Phillips." Trial Transcript, Vol. III, at 208. Thus, in comparison with *Haslip*, the instruction here did not tell the jury "to take into consideration the character and degree of the wrong," *see* Pet. App. 95a, but *did* allow it to consider Phillips' wealth—an inflammatory factor that this Court has recognized creates a dangerous risk of prejudice to a defendant. *See Haslip*, 499 U.S. at 19, 22; *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2723 (1993). In short, the punitive damage jury instruction in this case made close and objective judicial review of the verdicts more, not less, necessary.[8]

3. Question 3—The Duplicative Punishment Issue.

Robertson devotes its entire argument concerning Question 3 to its assertion that "'Phillips got what it asked for'" when the jury imposed two separate $4,000,000 punitive damage awards for causing a single injury to Rob-

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criminal penalties, . . . punitive damages are not awarded within discernible limits." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). As Justice Brennan recognized, the lack of any legislatively established "range of penalties as to which responsible officials had deliberated and then agreed" requires that the courts "look longer and harder" at punitive damage awards than other types of monetary punishments "that fall within statutory limits." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

[8] Indeed, three of the dissenting judges concluded that the punitive damage jury instruction "was unconstitutional." Pet. App. 39a.

ertson.[9] But Phillips never "asked" to be punished twice in this case. As thoroughly documented,[10] Phillips consistently objected to the first panel's confusing and unfair partial remand, which ultimately produced the two punishments for the same injury. *See* Pet. App. 52a n.24 (Beam, J., dissenting); Pet. at 14 n.5. Indeed, Robertson's contention that Phillips asked to be subjected to the duplicative awards "requires . . . a substantial misinterpretation of Phillips' reply brief in *Robertson* I." Pet. App. 45a n.17 (Beam, J., dissenting). Phillips' position in *Robertson* I was that the "global" $5,000,000 punitive damage verdict may have improperly rested on (1) the jury's finding that Phillips had breached its "duty of good faith and fair dealing," a finding that "was set aside by the district court after trial"; (2) the negligence count, for which punitive damages were not permissible; or (3) the fraud count reversed by the first panel decision. *Id.* 46a n.17. "Transformation of this argument [against a punitive damage award based upon an inappropriate or discredited legal theory] into a request by Phillips for consideration of duplicative punitive awards by the jury, is . . . a clearly incorrect reading of Phillips' brief." *Id.*[11]

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[9] Robertson's opposition contains a number of incorrect statements regarding Phillips' conduct and the nature of Robertson's injury. While it is unnecessary to address each and every one of these material distortions of the record at this stage, suffice it to say that there has never been *any* finding in this case—not by the two juries, the district court, nor the Court of Appeals—that Phillips "destroyed" Robertson. *See* Opp. at 3. There was "only one injury, [Robertson's] loss of the Spe-Dee Mart account," Pet. App. 3a, and the first jury found that Robertson itself was 30% responsible for that loss. Pet. App. 101a. Nonetheless, Robertson was fully compensated for the *entire* loss in February 1988. *See* Robertson's Supplemental Appendix.

[10] *See* Supplemental Appendix, *infra*, 1a-10a.

[11] Robertson's vehement criticisms of Phillips for purportedly changing positions ring particularly hollow since "it is Robertson, not Phillips, that has changed position as the litigation has progressed on the proper

The fact that Phillips did not object to the verdict form on the ground that it permitted the jury to consider both theories of liability and return separate verdicts for each does not constitute a "waiver" by Phillips or mean that Robertson is entitled to collect a double windfall. Rather, under the federal election of remedies doctrine the jury generally is allowed to consider both theories, and the plaintiff must elect between the two. *See, e.g., Kelco Disposal Inc.* v. *Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir. 1988), *aff'd.*, 492 U.S. 257 (1989); *Fineman* v. *Armstrong World Indus. Inc.*, 980 F.2d 171, 218-19 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993). Multiple penalties for the same injury also is a proper part of any meaningful excessiveness review. *Cf. Haslip*, 499 U.S. at 22.

Robertson's argument that the two separate theories of liability justify separate punishments not only conflicts with decisions of other state and federal courts, *see* Pet. at 20-21, but also ignores the fact that only the alleged tortious interference even arguably had a causal connection to Robertson's single injury. Pet. App. 47a (Beam, J., dissenting). Moreover, both theories were predicated on the same ultimate action—Phillips' refusal to fulfill a gratuitous commercial promise. *Id.* 53a. The infliction of two punishments here is completely redundant and utterly irrational.

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approach to awarding damages." Pet. App. 45a n.16 (Beam, J., dissenting).

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant certiorari and set this case for plenary consideration.

May 4, 1994

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1266WA

ROBERTSON OIL COMPANY, INC.
APPELLEE

v.

PHILLIPS PETROLEUM COMPANY
APPELLANT

PETITION FOR REHEARING

Appellant Phillips Petroleum Company for its Petition for Rehearing states that:

[1] 1. The Opinion of the panel correctly applies the rule of *Dudley v. Dittmer*, 795 F.2d 669 (8th Cir. 1986) to order a new trial on punitive damages. However, the Opinion fails to follow the precedent of *Dittmer* by not requiring a complete new trial on both compensatory and punitive damages since both damage issues were decided on general verdicts and were inextricably intertwined with the issues of liability.

* * *

I.

PHILLIPS IS ENTITLED TO A NEW TRIAL ON ALL ISSUES

[2] This Court has determined that the evidence was sufficient below to submit the theories of fraud, tortious interference with contract and negligence to the jury. However, the Court has ordered a partial new trial because proper issues were submitted to the jury along with improper issues (i.e. duty of good faith and fair dealing,

negligence and fraud) on a general verdict. Phillips respectfully submits that the law of the Eighth Circuit requires a new trial on all issues.

* * *

[4] Further support for this result is found in *Slater v. KFC Corporation,* 621 F.2d 932 (8th Cir. 1980) [relied upon by the Court in *Dittmer*], where the jury awarded Slater $265,000 in actual damage and $100,000 in punitive damages on claims of fraud. The Court of Appeals upheld the sufficiency of the evidence on the fraud theory but concluded that the damage instructions were erroneous. In considering whether to order a new trial on all issues or merely damages, the Court noted:

> "In addition, any award of punitive damages must turn on an assessment of KFC's conduct. Thus, we conclude that the issues of damages and liability in this case are so interwoven as to require a new trial on both."

621 F.2d at 938. *See also National By-Products, Inc. v. Searcy House Moving Co., Inc.,* 292 Ark. 491, 731 S.W.2d 194 (1987) [5] ("When we reverse a judgment for punitive damages, we normally must also reverse the award for compensatory damages because the issues are so interwoven that an error with respect to one requires a retrial of the whole case.")

* * *

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

NO. 90-1451 WA

ROBERTSON OIL COMPANY, INC.
APPELLEE

vs.

PHILLIPS PETROLEUM COMPANY
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

HONORABLE MORRIS S. ARNOLD, DISTRICT JUDGE

PETITION FOR REHEARING AND SUGGESTING FOR REHEARING *EN BANC*

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* * *

[5] The district court did not, however, instruct the jury in the second trial to make fresh determinations regarding whether Phillips was liable for tortious interference or whether it acted with malice, instead directing a verdict on the issue of [6] liability for punitive damages on that count. But in a legally indistinguishable situation, this Court in *Western Fireproofing v. W.R. Grace,* 896 F.2d 286 (8th Cir. 1990), refused to permit the type of a partial trial to which Phillips was subjected, stating that

> "a partial new trial . . . may not be properly resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. In the circumstances of this

> case, *we conclude the question of punitive damages is not sufficiently distinct from the question of liability for fraud and tortious interference to permit a new trial on the issue of punitive damages alone.*"

896 F.2d at 293 (quoting *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931)) (emphasis added). In this case, not only was Phillips subjected to a "partial new trial" on punitive damages alone, but the jury was never squarely instructed that an express finding of malice was a necessary predicate to the imposition of punitive damages for tortious interference with contract. That resulted in a gross and manifest injustice that deprived Phillips of its right to a fair trial and violated the Due Process Clause.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 91-3717 WAFS

ROBERTSON OIL CO.,

Appellee,

v.

PHILLIPS PETROLEUM CO.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF ARKANSAS

PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC*

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* * *

[7,n.4] Although *Robertson* I determined that the initial $5,000,000 punitive damage award was impermissible, it let stand the first jury's finding of liability on the tortious interference count and the $750,000 compensatory award explicitly because there was only one injury to Robertson in this case. 871 F.2d at 1376. The second trial therefore dealt only with the issue of Phillips' liability for fraud and Robertson's claims for punitive damages based on both its fraud and tortious interference theories. The limited scope of the *Robertson* I remand not only was "incorrect" and resulted in "a manifest injustice," slip op. at 22 & n.1 (Beam, J., dissenting), but it also directly conflicts with Supreme Court and Eighth Circuit authority. *See Gasoline Products Co. v. Champlin Refining Co.*, [8] 283 U.S. 494, 500 (1931) (ordering a partial retrial is constitutionally impermissible unless remanded issue "is so distinct and sep-

arable from the others [in the trial] that a [new] trial of it alone may be had without injustice."); *Western Fireproofing v. W.R. Grace & Co.*, 896 F.2d 286, 293 (8th Cir. 1990) (applying *Gasoline Products* and holding that retrial on "issue of punitive damages alone" in fraud and tortious interference case impermissible).

* * *

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 91-3717 WAFS

ROBERTSON OIL CO.,

Appellee,

v.

PHILLIPS PETROLEUM CO.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

SUPPLEMENTAL BRIEF FOR APPELLANT

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* * *

[1] . . . it is well settled that the law of the case doctrine is inapplicable when a federal court of appeals sitting *en banc* considers a case that has been the subject of multiple panel decisions.

In *Watkins v. United States Army,* 875 F.2d 699 (9th Cir. 1989) (*en banc*), *cert. denied,* 111 S. Ct. 384 (1990), the Ninth Circuit, sitting *en banc* after the second appeal of a case, [2] squarely overruled the first panel's decision. *Id.* at 705. The court flatly held that "[t]he law of the case doctrine does not . . . prevent us from considering the issues raised in *Watkins* I." *Id.* at 704 n.8.

Similarly, in *Shimman v. International Union of Operating Engineers, Local 18,* 744 F.2d 1226 (6th Cir. 1984) (*en banc*), *cert. denied,* 469 U.S. 1215 (1985), the Sixth Circuit held that "[t]he law of the case doctrine . . . does *not* impair the power of an en banc court to overrule *any*

panel decision," *id.* at 1229 n.3 (emphasis added), including prior panel decisions in the same case. The court went on expressly to overrule the decision four years earlier of the first panel to hear an appeal in the *Shimman* case.

Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) *(en banc), aff'd*, 444 U.S. 472 (1980), like the case at bar, involved *en banc* review after three different appeals in the same case. The full Second Circuit rejected the argument that "the court sitting *en banc* [should] . . . consider itself bound by the law of the case established by a panel on an earlier appeal, when that ruling was not reviewed *en banc.*" *Id.* at 436-37 n.9. The court explained:

> The purpose of the 'law of the case' doctrine is to prevent the continuous relitigation of issues decided by a panel at an earlier stage of a suit. The doctrine, which is . . . no more than an appeal to . . . 'good sense' . . . is properly applied to the district court and to other panels of the Court of Appeals. *It cannot immunize panel decisions from review by the court en banc.*

Id. at 437 n.9 (citations omitted; emphasis added).

* * *

[3] In short, this Court is free to revisit any previously decided issue in this case that relates to the important questions presented for *en banc* review.

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IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 91-3717 WAFS

ROBERTSON OIL CO.,

Appellee,

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PHILLIPS PETROLEUM CO.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

APPELLANT PHILLIPS PETROLEUM COPMPANY'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEFS

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* * *

[7] As Judge Beam recognized in his dissenting opinion in *Robertson* III, these factors are present here. For example, the decision in *Robertson* I[5] to remand this case for a retrial limited to the issue of punitive damages, while at the same time sustaining Phillips' liability for the $750,000 compensatory award, not only was clearly incorrect under cases such as *Western Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 293 (8th Cir. 1990) (retrial of "issue of punitive damages alone" in fraud and tortious interference case impermissible), and *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931), but that approach has resulted in "a manifest injustice to Phillips as the case has now developed." *Robertson* III, slip op. at 22 n.1 (Beam, J., dissenting).

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[5] 871 F.2d 1368 (8th Cir. 1989).

[8] Indeed, the peculiar and confusing *Robertson* I remand—coupled with the standardless, exclusively wealth-based Arkansas model jury instruction—produced two $4,000,000 punishments against Phillips for causing "only one injury" (*Robertson* III, slip op. at 2), that violate the Due Process Clauses of the Fifth and Fourteenth Amendments.

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